# In the United States Bankruptcy Court
## for the
## Southern District of Georgia
### Brunswick Division



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| In the matter of: | ) | |
| | ) | Chapter 7 Case |
| INDUSTRIAL MARINE | ) | |
| DIESEL, INC., | ) | Number 92-20668 |
| | ) | |
| *Debtor* | ) | |

**MEMORANDUM AND ORDER**
**ON DEBTOR'S MOTION TO REOPEN**

This matter comes before the Court on Industrial Marine Diesel, Inc.'s (hereinafter "Debtor"), Motion to Reopen its Chapter 7 case. Debtor seeks to reopen its Chapter 7 proceeding in order to pursue certain antitrust claims against Caterpillar, Inc. (hereinafter "Caterpillar"). Caterpillar objects to the Motion alleging that (1) Debtor has no standing, (2) no compelling reason exists to warrant the reopening of this case, and (3) laches bars Debtor from reopening its bankruptcy. This proceeding is a core matter under 28 U.S.C. § 157(b)(2)(A). For the reasons stated in this memorandum opinion, the Court will grant Debtor's motion. Pursuant to Fed. R. Bankr. P. 7052, this Court held a hearing on December 20, 1996, and makes the following findings of fact and conclusions of law.

## FINDINGS OF FACT

On September 18, 1992, Debtor filed for reorganization under Chapter 11 of the Bankruptcy Code. Pursuant to 11 U.S.C. § 521(1), Debtor filed a Statement of Financial Affairs and Schedules of Assets and Liabilities which revealed no potential antitrust claim against Caterpillar, Inc. (hereinafter "Caterpillar"). On June 15, 1993, Debtor's Chapter 11 bankruptcy petition was converted to a liquidation proceeding under Chapter 7, and a trustee was appointed. The Trustee subsequently filed a "Report of Abandonment of Property," indicating that Debtor's estate had no assets which were to be distributed to its creditors. A final decree in bankruptcy closing the case was entered on August 6, 1993.

At the time of the filing, Debtor had considered filing a lawsuit against Caterpillar although it seemingly concluded that any action would be unsuccessful. Since Debtor never listed this claim as an asset, the Chapter 7 Trustee who never had knowledge of its existence did not specifically abandon it. Debtor now alleges that subsequent to the closing of its bankruptcy case it learned key material facts which support a cause of action against Caterpillar and without which it could not have proceeded either before or after the closing of its bankruptcy.[1]

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[1] *See* Debtor's Summarized Supplemental Memorandum in Support of Motion to Reopen Case and in Response to Opposition of Caterpillar, Inc., p. 5 ("Industrial Marine only learned of facts sufficient to allege causes of action against Caterpillar in 1996").

As a result, on July 29, 1996, approximately three years after the closing of its case, Debtor filed a three-count complaint against Caterpillar alleging violation of federal antitrust laws, 15 U.S.C. §§ 1 and 2, and tortious interference with business relations. The case, styled Industrial Marine Diesel, Inc. v. Caterpillar, Inc., Case No. CV296-135, is pending in the United States District Court for the Southern District of Georgia, Brunswick Division. On September 30, 1996, Caterpillar filed a motion to dismiss the complaint alleging judicial estoppel or in the alternative that Debtor lacked standing. The District Court subsequently converted the motion to dismiss into a motion for summary judgment and requested supplemental submissions. Debtor now seeks to reopen its bankruptcy case in order to administer this previously unlisted claim. Caterpillar objects to Debtor's Motion to Reopen.

Caterpillar raises three issues: first, that Debtor has no standing to reopen its Chapter 7 case; second that no compelling reason exists to warrant the reopening of this case; and third, that laches bars Debtor from reopening its bankruptcy case. Debtor contests all of these assertions and further contends that Caterpillar has no standing to object to Debtor's Motion to Reopen. After reviewing the parties' submissions as well as the applicable authorities, this Court grants Debtor's Motion.

## CONCLUSIONS OF LAW

Section 350(b) of Title 11 and Bankruptcy Rule 5010 govern the reopening of bankruptcy cases. Section 350(b) of the Code provides as follows:

> (b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

Bankruptcy Rule 5010, entitled "Reopening Cases," in pertinent part also provides,

> A case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code.

Typically, a debtor seeks to reopen its bankruptcy in an effort to secure relief against a creditor - to include an omitted claim in the discharge, claim an exemption, or seek a determination of dischargeability. In those instances, the court balances the relief requested by the debtor against any harm that a creditor might have incurred as a result of the debtor's failure to bring a timely action. In the present case, Debtor's Motion to Reopen does not seek relief from one of its creditors, but instead requests authority to pursue a non-creditor third party against whom antitrust liability is alleged. Not surprisingly, the only party which has objected to this Motion to Reopen is the third party, Caterpillar. Despite this unusual factual scenario, the traditional analysis of Section 350(b) still applies. The decision to reopen a case remains within the broad discretion of the bankruptcy court. *See* In re

Phillips, 16 F.3d 417 (10th Cir. 1995) (motion to reopen "no-asset" bankruptcy is matter committed to the sound discretion of the bankruptcy court) Although Section 350(b) does not set a time limit within which to bring a motion to reopen, courts must consider prejudice to creditors. *See* Matter of Bianucci, 4 F.3d 526, 528 (7th Cir. 1993) ("The leading approach is permissive but incorporates an equitable defense akin to laches . . . "); *see also* Fed. R. Bankr. P. 9024 (one-year time limit of Rule 60(b) does not apply to motions to reopen). Further, passage of time in itself does not constitute prejudice, but the delay may be prejudicial when combined with other factors. *See* Id. (holding that delay in bringing motion coupled with expenses creditor incurred to enforce lien precludes reopening of case); Hawkins v. Landmark Fin. Co., 727 F.2d 324 (4th Cir. 1984) (affirming a bankruptcy court's refusal to reopen a case because eight months had passed since it was closed and the creditor incurred court costs and counsel fees in commencing foreclosure proceedings on its lien).

The first issue to consider is Caterpillar's standing to object to the motion. Debtor contends that Caterpillar, which is not a creditor and whose only interest in this matter is as a defendant in an antitrust lawsuit, is not a "party in interest" has no standing in these proceedings. I agree. *See* 11 U.S.C. 1109(b) ("A party in interest . . . may raise and may appear and be heard on any issue in a case under this chapter"). However, because

Caterpillar has failed to demonstrate how it holds any interest directly related to Debtor's Chapter 7 bankruptcy, I hold that it may not object to Debtor's Motion to Reopen. This holding conforms with long standing judicial precedent.

> [t]he question as to whether the estate shall be reopened concerns merely the bankrupt and his creditors. Adverse claimants to the bankrupt's property have no direct interest in that question.

Hunter v. Commerce Trust Co., 55 F.2d 1, 3 (8th Cir. 1932); *see also* Matter of Hopkins, 11 F.Supp. 831 (W.D.N.Y. 1934); Matter of Ayoub, 72 B.R. 808, 811 ("[I]t is evident that . . . , the defendant against whom the jury verdict was granted, has no standing to oppose the [motion to reopen]"); In re Alpex Computer Corporation, 71 F.3d 353, 356 (10th Cir. 1995) (holding that the concept of standing does not include everyone with a pecuniary interest and instead is limited to "debtors, creditors, or trustees, each with a particular and direct stake in reopening cognizable under the Bankruptcy Code"). Caterpillar contends that it has standing because the Debtor originally listed it as a creditor on the schedules. According to Caterpillar, "scheduled creditors" have standing to object to a motion to reopen. *See* Matter of Miller, 767 F.2d 1556, 1559, n.4 (11th Cir. 1985); In re Nelson, 100 B.R. 905 (Bankr.N.D.Ohio 1989). However, both of the cases cited by Caterpillar involve "actual creditors" who were afforded an opportunity to utilize or object to a Section

350(b) motion. Here, Caterpillar does not claim that it was a creditor at the time of filing or has become one any time thereafter. The erroneous listing of a party as a creditor does not create a "party in interest" and, therefore, does not confer standing upon an objector. Accordingly, Caterpillar has no standing to object to this Motion.

Considering whether the Debtor has standing to bring this Motion, I hold that both of the plain language of Bankruptcy Rule 5010 and the fact that Debtor is a party benefitted by the granting of the Motion confer standing upon it. First, Bankruptcy Rule 5010 clearly states that, "[a] case may be reopened on motion of the debtor . . . ." Second, in Miller, the Eleventh Circuit Court of Appeals stated that a party "who would be benefitted by the reopening" has standing to reopen a case. *See* Matter of Miller, 767 F.2d at 1559, n.4. Although the Court realizes that it cannot determine as an absolute certainty whether the Debtor will ever realize any monetary benefit from pursuing this claim, I hold that because Debtor has an interest in any surplus of the claims asserted in the District Court action, after its creditors and administrative expenses have been paid, the addition of a potential claim to Debtor's estate is enough of a benefit to create an alternative basis for standing.

In opposition, Caterpillar contends that a debtor may not reopen a case to "administer an asset" and cites Matter of Ayoub, 72 B.R. at 812 ("if the purpose of

reopening the estate is to administer assets, only creditors have standing to seek an additional administration and clearly not the debtor"). However, that case was decided before Bankruptcy Rule 5010 was amended to include the language "[a] case may be reopened on motion of the debtor . . . ." *See* Fed. R. Bankr. P. 5010 (Advisory Committee Note 1987). As it is written presently, Bankruptcy Rule 5010 permits a debtor to reopen a case under Section 350(b) to administer assets, to accord relief to the debtor, or for other cause and, therefore, Debtor has standing to seek a reopening of this case even though its purpose is to administer an asset.

Finally, in order to prevail on its Section 350(b) Motion to Reopen, Debtor must demonstrate either good cause or the existence of compelling circumstances. *See* Matter of Gratrix, 72 B.R. 163, 164 (D.Ala. 1984). In this case, Debtor requests permission to reopen in order to administer an asset of the estate, i.e. to pursue an antitrust action against Caterpillar. Considering that Debtor's Chapter 7 case was administered as a "no-asset" case, I hold that "the possible return of money to the estate justifies the reopening of the case." In re Petty, 93 B.R. 208, 211-212 (9th Cir. B.A.P. 1988). Because no "actual creditor" has objected to this motion and because the effect potentially will benefit creditors, I hold that the delay in bringing this action does not constitute prejudice

to creditors that bars the reopening of this case.[2]

## ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Debtor's Motion to Reopen is hereby GRANTED.

IT IS FURTHER THE ORDER OF THIS COURT that a Chapter 7 trustee be appointed to investigate, and pursue, if appropriate, Debtor's claims against Caterpillar.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 29th day of January, 1997.

[2]This holding does not address Caterpillar's contentions that Debtor, in contrast to Debtor's assertions, knew of the existence of this case and should be estopped from asserting this claim. That defense is asserted in the pending District Court litigation and any estoppel defenses against Debtor, or the Trustee who lacked any knowledge of the potential claim, properly are lodged there.